STATE OF MICHIGAN

COURT OF APPEALS

KOHL, SECREST, WARDLE, LYNCH, CLARK and HAMPTON,

Plaintiff/Counterdefendant-Appellee,

v

THEODORE S. ANDRIS and ELANE ANDRIS,

Defendants/Counterplaintiffs-Appellants.

UNPUBLISHED
August 6, 1999

No. 208376
Oakland Circuit Court
LC No. 97-541963 CK

Before: Doctoroff, P.J., Markman and J.B.Sullivan*, JJ.

PER CURIAM.

Defendants appeal as of right from an order granting plaintiff's motion for summary disposition of its complaint and defendants' counter-complaint. We affirm.

Defendants contend that the trial court erred in granting summary disposition of plaintiff's complaint for breach of contract/account stated where plaintiff failed to present evidence of an express contract and defendants vehemently disputed that $125 was the agreed hourly charge. We disagree.

"A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, and other documentary evidence available to it and grant summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. This Court reviews summary disposition decisions de novo to determine whether the prevailing party was entitled to judgment as a matter of law." *Hughes v PMG Building, Inc*, 227 Mich App 1, 4; 574 NW2d 691 (1997).

The essential elements of a contract are: parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). Defendants do not dispute that they entered into a contract for legal services, but attack plaintiff's failure to submit a written

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*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

contract. Admittedly plaintiff did not submit documentation *with language* containing an express retention of plaintiff for legal services. However, plaintiff submitted, with its complaint, billing records which delineated services performed and costs incurred. The billing records also established that the charged rate for legal services was $125 per hour. Additionally, it is undisputed that defendants paid their legal bills without disputing the rate of $125 per hour between 1988 and 1993. Accordingly, an express contract or contract implied in fact has been established under the circumstances. *Ford v Blue Cross & Blue Shield*, 150 Mich App 462, 466; 389 NW2d 114 (1986).

Defendants contend that various affidavits regarding the reasonableness of the fee charged in light of the result achieved preclude summary disposition of plaintiff's complaint. We disagree. Defendant Theodore Andris' affidavit and attorney Thomas Shearer failed to take issue with specific charges. Mere conclusory allegations in an affidavit, which are devoid of detail, is insufficient to satisfy the burden on the opposing party to establish a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 372; 547 NW2d 314 (1996). Accordingly, the trial court did not err in granting plaintiff's motion for summary disposition of its complaint.

Defendant also contends that the trial court erred in granting summary disposition of their counter-complaint pursuant to MCR 2.116(C)(7). We disagree. "When reviewing a motion for summary disposition granted pursuant to MCR 2.116(C)(7), this Court must accept as true the plaintiff's well-pleaded allegations and construe them in a light most favorable to the plaintiff. The motion should not be granted unless no factual development could provide a basis for recovery." *Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363, 365; 579 NW2d 374 (1998). "The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)." MCR 2.116(G)(5).

MCL 600.5805(4); MSA 27A.5805(4) provides that the period of limitations for filing an action alleging malpractice is two years. MCL 600.5838; MSA 27A.5838 sets forth the time of accrual of a claim for malpractice against a member of a state licensed profession:

> (1) Except as otherwise provided in section 5838a, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.
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> (2) Except as otherwise provided in section 5838a, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise

applicable to the claim shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is barred.

In *Chapman v Sullivan,* 161 Mich App 558, 559; 411 NW2d 754 (1987), this Court held that the appropriate inquiry for determining the last date of service was not the date of formal termination of the attorney-client relationship, but rather, the last date of service. However, the statute of limitations period may be extended where there is continuing representation by an attorney. *Maddox v Burlingame*, 205 Mich App 446, 451; 517 NW2d 816 (1994).

Defendants' contention that the statute of limitations commenced in March 1997, when they relieved plaintiff from further representation, is without merit because of the change in focus from formal discharge to the activity performed. Review of documentary evidence reveals that defendants effectively terminated the attorney-client relationship in November 1994. On November 28, 1994, defendant Theodore Andris sent a letter to Gerald Fisher, an attorney employed by plaintiff, which provided that he would be handling the appeal of the dismissal of the underlying litigation. Additionally, the billing records submitted with plaintiff's complaint indicate that plaintiff's services for defendants ended in October 1994. Pursuant to the letter, the statute of limitations expired in November 1996. Therefore, the filing of defendants' counter-complaint for legal malpractice on May 13, 1997, was untimely because it was outside the two-year statutory period.

Defendants contend that a factual issue exists regarding when the termination of plaintiff occurred. Defendant Theodore Andris' affidavit provides that he "intermittently communicated" with Gerald Fisher regarding recommencement of the underlying zoning action and discussed the possibility of an alternative fee agreement. The affidavit is insufficient to establish continuing representation by plaintiff because it fails to delineate specific facts which would cause this Court to conclude that Fisher or plaintiff provided legal services, advice or action on behalf of defendants in 1995 or 1996. *Quinto, supra*, 451 Mich 372.

Alternatively, defendants assert that they did not discover the malpractice until this lawsuit was served. This lawsuit was filed on April 9, 1997, and defendant Theodore Andris was served on April 14, 1997. On May 13, 1997, defendants filed their counter-complaint alleging negligence and legal malpractice. Defendants assert that this legal malpractice claim was timely as it was filed within six months of the discovery of the legal malpractice. However, the standard applied to discovery of malpractice is not actual discovery, but rather, when the client *discovered or should have discovered* the legal malpractice, whichever is later. *Brownell v Garber*, 199 Mich App 519, 523; 503 NW2d 81 (1993). Defendants handled the claim of appeal from their underlying litigation against the City of Novi. The underlying litigation was dismissed in 1994. Defendants should have discovered any alleged malpractice at that time because they handled their own appeal which involved the issue of exhaustion of administrative remedies. Accordingly, the six-month discovery rule would have elapsed in mid-1995. Therefore, summary disposition of defendants' counter-complaint was properly granted pursuant to MCR 2.116(C)(7).

Defendants also contend that the trial court erred in granting summary disposition of their counter-complaint pursuant to MCR 2.116(C)(8). Our holding that summary disposition of the

counter-complaint was proper pursuant to MCR 2.116(C)(7) renders this issue moot. Defendants further contend that the trial court erred in failing to disqualify itself. This issue is not preserved for appellate review as there is no evidence that chief judge review of this issue was sought by defendants. MCR 2.003(C)(3)(a); *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). Finally, we are not persuaded that *Mudge v Macomb Co,* 458 Mich 87; 580 NW2d 845 (1998), cited in defendants' brief filed May 26, 1999, compels reversal of this case.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Stephen J. Markman
/s/ Joseph B. Sullivan